SPECIAL BOARD OF ADJUSTMENT NO. 1112
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Vs.
BURLINGTON NORTHERN &
SANTE FE RAILWAY CO.,

CASE # 57 – Roger Hubregtse (10-day Record Suspension)
AWARD NO. 58

Dennis J. Campagna, Esq., Referee
William A. Osborn, Carrier Member
Roy C. Robinson, Organization Member

BACKGROUND

A. Special Board of Adjustment #1112

This Special Board of Adjustment was created pursuant to the provisions outlined in a Memorandum of Agreement ("MOA") between the Carrier and the Organization dated September 1, 1982. Appeals reviewed under this MOA are expedited, and the Award resulting from any appeal, bearing only the Referee's signature, is considered "final and binding" subject to the provisions of the Railway Labor Act.

B. The Appellant

Roger Hubregtse, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on April 1, 1991. At all relevant times, the Appellant was working as a Grinder in Douglas, Wyoming. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about March 10, 2003, as a result of a formal investigation conducted on Monday February 10, 2003, the Appellant was served with charges, seeking a ten (10) day Record Suspension for his alleged violation of BNSF MOW Engineering Instructions, Rule 11.15.1, effective January 15, 1999, and BNSF Railway Company Thermite Welding Manual Boutet Process, Rules and Procedures, Rule 30.2 dated March 1, 1997 for his failure to produce thermite welds according to the requirements of the BNSF Thermite Welding Manual, and his failure to ensure that completed thermite welds were marked and identified correctly, while performing his duties on January 15, 2003, at or near MP 117.7 on the Orin Subdivision, while he was working as assigned Grinder[1], headquartered Douglas, Wyoming.

D. Facts Gathered from the February 10, 2003 Investigation

On February 10, 2003, a formal investigation was conducted by Darrell Leibhart, Roadmaster, who served as the investigating officer. At all times during the investigation, the Appellant was represented by Jim Varner, Local Chairman BMWE. The record created at this formal investigation established that:

- On January 15, 2003, a crew consisting of Philip Rath, welder, Roger Hubregtse, Grinder, and John Hellyer, Grinder operator, was assigned to perform thermite welding operations in order to replace the stock rail and a switch point. On that date, Mr. Hellyer was replacing Don Tipton, who was absent due to a required DOT physical. Mr. Rath defined the thermite welding process as follows:

[1] The Appellant was, at all relevant times, functioning as a Grinder, assisting Philip Rath, who was the welder for the project at issue. While the second paragraph of the letter of March 10, 2003 identifies the Appellant as a "welder", this reference is no doubt a typo, particularly given that the first paragraph of this letter correctly identifies the Appellant as the Grinder on this project.

"Thermite weld is a welding process in which we use, two rail ends are aligned using a three foot straight edge, you get a proper crown, proper alignment as far as your sides and with your web and your ball. Then the rail is heated up from excess of around 5,000 degrees using propane an oxygen torch. At that time, when it reaches proper heat, we use a charge that sits on a pair of preformed molds that fit over the rail discharges, then melt it and pours into that mold after five minutes or so we can break the mold down, shear it, and you have a finished product there, weld product that holds the rail ends together. (TR 12)[2]

- It is undisputed that January 15th was a "miserable day", cold and snowing. This regard, Mr. Hellyer noted "I know it was a cold day, that day and everybody just wanted to get it done and be done with it. It was snowing and it was a miserable day." (TR 17. See also TR 19)

- Following the welding operation, Mr. Rath left early that day in order to attend a doctor's appointment, thereby leaving Mr. Hellyer and the Appellant to complete the job. (TR 19)

- It is the function of the welder and grinder(s), working as a team, to insure that the finished thermite weld is within the specifications outlined in the Thermite Welding Manual, Rule 13.1.[3] In this regard, the Appellant stated "We just helped eachother, on a project like that we're walking back and forth and helping in a timed process, so you help wherever you're needed at the time. And, it's never real important in a shared work project to determine which person does exactly what task." (TR 19)

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[2] All "TR" references refer to page(s) of the official Transcript of the Investigation held on February 10, 2003 in Douglas, Wyoming.

[3] Rule 11.15, "Thremite Welding", provides that "All employees welding and grinding should have a current copy [of the Manual] in their possession." (See Exhibit H)

- Relevant to this proceeding, the Manual provides at Rule 13.0:

> "a. The purpose of the alignment of the rail ends is to properly position the rail ends such that, after the weld has completely cooled to ambient temperature, the rail through the weld area is perfectly flat and perfectly straight with no twists between the vertical axes of the rail ends.
>
> d. Alignment of the rail is performed with a 36" straight edge and taper gauge."

(See Exhibit I)

- It is the grinder's responsibility to perform the proper gauge measurements to insure that the alignment measurements are in conformity with the BNSF Thermite Welding Manual. (TR 12) Tolerances are 30 thousandths (0.030"), 15 thousandths (0.015") on both ends combined with the 30 thousandths, to a maximum of 60 thousandths (0.060"), "[b]ut no more than that." (Adler testimony, TR 8)

- On January 29, 2003, R. Adler, Welding Supervisor, logged the following incident:

> "117.5 BW Main one weld in front of switch .170 high. No signature by welder or grinder. Installed by Leling on 1-15-03.
>
> Weld two on stock rail .180 high . . no signature or marking by welder or grinder;
>
> Weld number three on point .160 high . . no marking or signature by welder or grinder.
>
> Check with the Roadmaster and Phil Rath and Don Hellyer and Roger Hubregtse was sent there on the 15th of January with Section to weld in the point and stock rail." (See Exhibit C)

- With regard to the grinding tolerances, the Appellant acknowledged that it was the grinder's responsibility to take measurements during and after the grinding. (TR 23) However, he noted that he was without a taper gauge and accordingly, chose to "eyeball it". (TR 26) In this regard, the Appellant maintained that it was the welder's responsibility to insure that the team had the proper tools. Mr. Rath maintained that he brought his lack of a taper gauge to the Roadmaster's attention, but never informed his supervisor.[4] (See TR 14)

- The "signature" process requires that upon completion of the thermite welding process, it is the welder's responsibility to sign his name, date, rail temperature, the addition or subtraction of any rails and the grinder's initials. This information is also logged and sent to Mr. Adler, the Welding Supervisor, at the end of each month. (TR 8, 12)

- While it is undisputed that the thermite welds performed on January 15th lacked the required "signature", it is disputed as to who bears the responsibility for this action. Contrary to the position taken by the Carrier, both Mr. Hellyer and the Appellant maintain that the welder bears the sole and ultimate responsibility to "sign" the rail as noted above. In this regard, the Appellant noted "As a grinder operator, I have never been required to sign a weld." (TR 21)

- Mr. Rath admitted that he did not sign any of his three welds. (TR 45) Mr. Hellyer and the Appellant stated that they fulfilled their responsibilities "completely".

[4] The Appellant noted that Mr. Adler told him to use a "nickel" for this purpose. (TR 14) Mr. Rath testified that he did not have a nickel on him that day, "[W]e haven't been getting much overtime so I'm kind of poor." (TR 16)

POSITION OF THE PARTIES

A. The Organization's Position

Initially, it is the Organization's position that the Investigation violated Rule 40. In this regard, while Rule 40 provides a 15 day period in which to conduct an investigation "from the date of the occurrence", the Carrier waited 26 days from the date of the alleged incident. Accordingly, the Organization moves the dismissal of the instant matter as a result of the Rule 40 violation.

With respect to the merits, the Organization maintains that the Charges against the Appellant have no validity and should be dismissed for the following reasons:

1. Mr. Adler, the Welding Supervisor, maintained a daily log that shows that on January 15, 2003, he measured three welds at Milepost 117.5. However, the three Principals as well as the remaining Company witnesses testified that the three welds at issue were, in fact, at Milepost 117.7, a significant difference given that numerous switches exist between these two Mileposts. Accordingly, a question exists as to whether or not Mr. Adler measured the correct welds, and whether such welds can be attributed to the Principals.

2. Next, the Organization maintains that it is not the Grinder's responsibility to sign welds, and the Carrier has not demonstrated to the contrary. Accordingly, the Appellant has been charged with his failure to perform a duty that is clearly not his responsibility. In this regard, the General Rules and Procedures, Section 1.8.3, part C supports the Appellant's contention that it is the Welder's and not the Grinder's responsibility to oversee the job at hand – in other words, the buck stops with the Welder.

3. With respect to the method of weld measurement, while Mr. Adler testified that a straight edge is used to measure a weld and healing or leaning on one end of it,

the record is void of any supporting documentation in this regard. Moreover, while the Principals, including the Appellant testified that they did try to secure the proper tools, they were unsuccessful.

4. Next, the Organization maintains that the welds were performed in accordance with the Burlington Northern Santa Fe Railroad Thermite Welding Manual and logged properly. In addition, the Principals, including the Appellant, testified that proper alignment tools were used to perform the Thermite Welds. In this same general regard, the Appellant performed his grinding tasks, to the proper tolerances, to the best of his ability with the tools he was supplied.

Given the foregoing, the Organization urges the dismissal of all Charges against the Appellant.

B. The Carrier's Position

It is the Carriers position that it has complied with Rule 40, and that the Charges at issue have substance. In support of this position, the Carrier asserts:

1. With respect to the alleged Rule 40 violation, the Carrier asserts that January 29th was the first date it became aware of the deficiencies giving rise to the instant charges. The Investigation was conducted on February 10th, well within the 15 day guideline provided by Rule 40.

2. With respect to the merits of the Charges, the Employer maintains that in the absence of the Welder, it is the Grinder's responsibility to sign the rail. In this regard, the Grinder is the only individual present who could certify that the welding task was performed according to proper specifications. Moreover, the Carrier asserts that the "common bond" that has existed since 1978 makes it clear that "[w]hoever's packing weld on the other side is part of making the thermite weld." Engineering Instructions 11.15.17 support this proposition.

3. Next, the Carrier maintains that in all instances, it is the Grinder's responsibility to hold tolerances to their specified measurements. This point is supported by the testimony of Mr. Rath, who served as the Welder on the jobs at issue. Moreover, there is no dispute that Grinders, including this Appellant, have been schooled on proper procedures and measurements. In fact, the Carrier notes, this Appellant received training as recent as September 25, 2002 through Johnson County Community College. In this regard, Mr. Adler specifically recalls that Grinders were instructed at this course about their rail signing obligation as well as their obligation to follow the hot grinding process.

4. In addressing the Appellant's contention that he lacked the proper tools to do the job, the Carrier asserts that a Grinder or Welder as the right to protest a job whenever the proper tools are not available. (See TR 24) Moreover, Mr. Adler testified that neither the Welder nor either Grinder, including the Appellant, ever informed him of their lack of the proper tools, including a taper gauge. Accordingly, there is no basis in the record evidence to support the Appellant's contention.

Given the foregoing, the Employer urges that the charge against the Appellant be upheld, and the 10 day Record Suspension ordered.

DISCUSSION

A. The Role of the Referee in the Instant Matter

Pursuant to the Memorandum of Agreement between the parties dated September 1, 1982, the role of the Referee in this matter is three-fold:

1. To determine whether there was compliance with the applicable provisions of Schedule Rule 40;
2. To determine whether substantial evidence was adduced at the investigation to prove the charge at issue, and
3. To determine whether the discipline was excessive.

(MOA, Paragraph 8)

B. The Issue Regarding Compliance with Rule 40

Rule 40 provides, in substantial part that:

> An employee in service 60 days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than 15 days from the date of the occurrence, except that personal conduct cases will be subject to the 15 day limit from the date information is obtained by an officer of the Company . . .

The word "occurrence" in its common usage connotes an incident or event that happens without design or expectation. As applied in the instant matter, it is reasonable to conclude that the "occurrence" giving rise to the Investigation happened when Mr. Adler became aware of the deficiencies at issue, or on January 29, 2003. In this regard, it is noteworthy that Mr. Adler's observation was not so remote in time so as to raise a claim of equitable estoppel.[5] Accordingly, the Investigation, conducted on February 10, 2003, conformed with Rule 40.

[5] Of course, there may come a time when an observation by a supervisor occurs at a time too distant from the date the job was performed. In such a case, the Organization could raise a Rule 40 argument, maintaining that absent extraordinary circumstances, the Supervisor's observations were too remote to give rise to any charge. Cases of this nature giving rise to a Rule 40 claim must, therefore, be addressed on a case-by-case basis.

C. Substantial Evidence Exists to Support the Instant Charge

Initially, this Referee notes that he sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, I must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record.

Turning now to the merits of the Charge, Black's Law Dictionary, Fifth Edition, defines "Substantial Evidence" as follows:

> Such evidence that a reasonable mind might accept as adequate to support a conclusion. It is that quality of evidence necessary for a court to affirm a decision of an administrative board. Under the "substantial evidence rule," reviewing courts will defer to an agency determination so long as, upon an examination of the whole record, there is substantial evidence upon which the agency could reasonably base its decision.

Boiled down to its basic elements, the Carrier maintains that the Appellant was negligent in performing his Grinding tasks, which included his obligation to sign the rail in the Welder's absence. In such cases, Referees will sustain reasonable disciplinary action where it is shown that an employee failed to exercise a reasonable degree of care in performing his duties, or failed to do what a reasonably prudent employee would have done in the same or similar circumstances. Referees generally require an employer to establish one or more of the following factors to sustain allegations of negligent action:

a. The employee had an obligation or requirement to perform the act at issue;

b. There was actual or potential damage to persons, property or the Carrier;

c. The act or omission was unreasonable under the circumstances;

d. The employee was trained and capable of performing the act alleged to be negligent;

The record evidence supports the conclusion that each of the foregoing points was met in that:

a. It is clear that the Appellant had the obligation both to sign the rail in the Welder's absence, and to hold grinding tolerances to the specified level. In this regard, the Appellant himself acknowledged that the Welder and Grinder(s) operate as a team when he testified: "We just helped eachother, on a project like that we're walking back and forth and helping in a timed process, so you help wherever you're needed at the time. And, it's never real important in a shared work project to determine which person does exactly what task." (TR 19) Engineering Instructions 11.15.17 further support the Carrier's position. In relevant part, it is clear that "The employee in charge of the welding crew is responsible for ensuring that completed thermite welds are marked and identified correctly. While it is true that the Welder is the primary individual in charge of the site, it is equally true that in the Welder's absence, the Grinder is the only individual present who could certify that the welding task was performed according to proper specifications.

b. Engineering Instructions, Welding and Grinding, Section 13.0 sets forth the fact that the employee in charge of the welding crew is responsible for ensuring that the completed thermite welds are marked and identified correctly, and held to specific tolerances. It is apparent that these instructions were more concerned about the act of marking and identifying the welding operation than who specifically would be responsible for this action. In this later regard, had the Instructions wished to specify that the Welder holds this responsibility in all instances, it would have so stated. Accordingly, and consistent with both Mr. Alder's and the Appellant's own testimony

as to the function of the "team", when the Welder leaves the team, the Grinder bears the responsibility for marking and identifying the welding operation.

c. Next, I find that the Appellant's failure to hold to required tolerances was unreasonable. In this regard, the record evidence reflects that the Appellant did not deny this allegation, but rather opted to use the defense that he lacked the proper tools/gauges to perform the job to the expected tolerances. In so doing, the Appellant noted that it was the Welder's responsibility to provide the proper and required tools for the job, and that while he informed the Roadmaster of his lack of the proper gauges, he was never supplied with same. Accordingly, the Appellant admitted that he chose to "eyeball it". While the Appellant may have chosen to perform his duties in this manner, it is reasonable under these circumstances for an objective employee standing in the shoes of the Appellant to foresee the potential failure to hold the required tolerances. Moreover, even accepting the Appellant's testimony that he informed the Roadmaster of the lack of a taper gauge, it remains undisputed that he failed to inform Mr. Adler, his immediate supervisor of same. Accordingly, under these circumstances, where, as here, the Appellant elected to perform his job without proper tools, electing instead to "eyeball it", he must be prepared to accept the consequences of his failure to perform his job in an acceptable manner.

d. Next, it was undisputed that the Appellant was trained, as recent as September 25, 2000 regarding the expectations of his job as they relate to utilize proper tools in grinding to BNSF tolerances, as well as his obligation under the circumstances of this case, to mark and identify completed thermite welds appropriately.

Finally, in addressing the issue raised by the Organization as to the proper Milepost designation, I find that any doubt as to which Milepost, 117.5 vs. 117.7 applies, is overcome by the admission of Mr. Rath who acknowledged that he failed in his responsibilities as alleged. Had there been any serious and credible dispute over the

correct location of the welding jobs at issue, it is reasonable to conclude that Mr. Rath would have so indicated. Moreover, while Mr. Adler may have indicated MP 117.5 in his logbook, the relevant facts gathered at the Investigation left no doubt that the Milepost at issue was at or near MP 117.7. Accordingly, I find that the correct Milepost designation was at or near MP 117.7 as noted in the Charges.

Given the foregoing, I find and conclude that substantial evidence exists to prove the charges at issue.

D. The Appropriate Penalty

Having found and concluded that there is substantial evidence in the record to support the charge at issue, there remains a question as to the appropriate penalty. Under the circumstances of this case, I find no basis to disturb the penalty imposed by the Carrier.

CONCLUSION AND AWARD

Given the foregoing discussion and analysis, it is the determination of this Referee that:

1. The Carrier has substantially complied with Rule 40;
2. Substantial evidence exists to support the charge at issue, and
3. The 10 day Record Suspension sought by the Carrier is a reasonable penalty under the circumstances of this case.

9 May 2003
Dated

Dennis J. Campagna, Referee
SBA No. 1112